IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 178.

UEBERSEE FINANZ-KORPORATION, A. G., *Petitioner*,

v.

J. HOWARD McGRATH, Attorney General and as successor to the Alien Property Custodian, *Respondent*.

PETITIONER'S REPLY BRIEF.

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I.

It is difficult to understand the Government's contention that the issues raised by the petition do not present "any question of general interest calling for further review by this Court" (Br. 29). In support of it the Government argues (Br. p. 13) (1) that the sole question is whether Petitioner is an enemy or is enemy tainted within the principles stated by this Court in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480; (2) that the District Court properly followed those principles; and (3) that therefore there is no question of importance raised here.

But this argument flies in the face of the language of this Court in the former *Uebersee case*, that the principles governing enemy taint must await further clarification. The opinion there recognized that fractional ownership by a neutral corporation does not necessarily constitute enemy taint and justify confiscation of the property. The opinion states (332 U. S. at 489-90):

> "It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification."

The case is again before this Court and the findings below present the precise question as to the principles of enemy taint reserved for future decision by the former opinion. The alleged enemy taint here is as follows: The property seized was owned by a neutral corporation. The shares of this corporation are owned by a neutral citizen, Fritz von Opel. His parents, who were German citizens, own a partial life interest in these shares. This interest was created by a usufruct established in 1931, long before there was any question of war between Germany and the United States and for reasons that had nothing to do with German-American relations. Instead, it arose out of a gift by the Opel parents to make financial provision for their son. The usufructuary right found by the Court gave the parents

a claim on 80% of the dividends of the neutral corporation for their lives and certain rights of management to protect that claim. The reversionary interest was in Fritz von Opel. No dividends were ever received by the parents and no actual enemy management was exercised after 1940 or at the time of outbreak of war in 1941 or vesting in 1942. The neutral property was always actually controlled and managed solely by American or neutral citizens. It was never utilized by the Axis in any way.[1]

Yet the court below permitted the Alien Property Custodian to confiscate as enemy tainted not only the life interest of the enemy in 80% of the dividends, but also the neutral interest in the remaining 20% and the entire reversionary interest of the neutral.

Not only is the Government's argument that there is no issue of importance here inconsistent with the former decision of this Court; it is also inconsistent with the position taken in the Government's brief in No. 172 (*Kaufman* v. *Societe Internationale*) which states, with reference to this Court's former *Uebersee* opinion (p. 11): "Some of the questions raised by *Uebersee* were of undoubted importance." In a footnote (p. 11) the Government quotes the very language from the opinion which we rely on here. The precise question left for future decision by the former opinion is "the extent of holdings necessary to constitute an enemy taint," (332 U. S. at 489).[2]

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[1] "We find not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis." *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 487.

[2] Neither the trial court nor the court below made any reference to any of the authorities, discussed in the briefs in the court below, on the question of the enemy interest in shares of a neutral corporation sufficient to constitute enemy taint. See *The Unitas* [1948] P. 205, aff. 2 All Eng. Rep. 219; *The Glenroy* [1945] Ap. C. 124; *Re G. Hardt & Co. Pty. Ltd.* (1940), 13 Australian Law Journal 425; *Overseas Trust Corp. Ltd. v. Godfrey* (1940), South African Law Reports, Cape of Good Hope Provincial Division 117; *Re Badische Co. Ltd.* [1921] 2 Ch. 331; *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co.* [1916] 2 Ap. C. 307 (discussed in *Behn*,

Respondent is not a private litigant who is free to take one position in one case and an entirely diametrically opposing position in another. It is rather a public official under a duty to administer the law fairly and uniformly. In the light of this obligation we suggest that Respondent should welcome the Supreme Court's determination of the question which it concedes (No. 172, Br. p. 11) to be important in the administration of the Trading With the Enemy Act.

In order to extricate itself from the inconsistency involved in conceding that the *Uebersee* case presents an important question and at the same time suggesting that it should not be decided, Respondent, in its brief in No. 172 (pp. 11-12), refers to several bills pending before Congress which concern the question in this case. We have examined the hearings on these bills. They reveal that Respondent when it appears before Congress has opposed them and so far prevented their adoption. Respondent thus appears to be using every effort to prevent clarification of this issue either by the Court or by legislation.

II.

In our Petition for Certiorari we raised as a separate point the fact that the decision of the Court below confiscates the entire property of petitioner, a neutral corporation, notwithstanding the reversionary and other interests in a neutral citizen. It should be noted that the legal ownership of the American property was in a neutral corporation, Uebersee, and that only by disregarding the corpo-

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Meyer & Co. v. *Miller*, 266 U. S. 457); *Fritz Schulz Jr. Co.* v. *Raimes & Co.*, 100 Misc. 697, 166 N. Y. Supp. 567; *H. P. Drewry, S.A.R.L.* v. *Onassis*, 266 Ap. Div. 292, aff'd. 291 N. Y. 779, 188 Misc. 912, 69 N. Y. Supp. (2d) 850, aff'd. 272 Ap. Div. 870; E. J. Cohen, *German Enemy Property*, International Law Quarterly, Vol. 3 (1950) p. 548; Domke, *The Control of Corporations*, International Law Quarterly, Vol. 3 (1950) p. 52; Schuster, *The Nationality and Domicile of Trading Corporations*, Grotius Society Proceedings, Transactions, Vol. II, p. 57, 84 (1917).

rate entity and treating the American assets of Uebersee as if they were owned directly by a stockholder can the enemy interest be spelled out. Eliminating the corporate entity, it is found that Wilhelm and Marta von Opel, the enemies, own a life interest in 80% of the American corporate shares while Fritz von Opel owns the remaining 20% and the reversion in the 80%. Whether the life interest taints the reversion and justifies its confiscation even though it is owned by a neutral is clearly one of the important questions reserved for future decision by the opinion of this Court in the former consideration of this case.

Respondent argues that it is not a question of importance for the following reasons: (Br. 24-25) (1) that the claim was advanced too late, (2) that Uebersee Finanz-Korporation was in no position to assert it, and (3) that the non-enemy interest was "neither separate nor non-enemy".

As to timeliness, (1) above, the record shows that the question was raised first in the District Court (R. 50-51) and then on appeal. It was raised again in the petition for rehearing (R. 2329) and the court below expressly ruled on it. The matter is therefore squarely before this Court.

(2) As to the right of Uebersee to assert that part of its property was not tainted, certainly a corporation should be able to protect its assets from confiscation by the Alien Property Custodian by showing they are neutrally owned either in whole or in part. Here Uebersee is asserting, not a stockholder's right, but its own right to prevent the Custodian from stripping it of its property.

In spite of this the Government seems to imply that a suit by Fritz von Opel rather than Uebersee is the appropriate method for preventing the seizure of the neutral interest in a neutral corporation's assets. In contradiction of this position, as appears from Respondent's brief in No. 172, when such suits are filed by stockholders, Respondent contends they must be dismissed on the ground that stockholders have no right to sue. All of these inconsistent positions fundamentally relate to the undecided question

as to what constitutes enemy taint. They are important and they urgently need clarification.

As to Petitioner's argument in support of (3) above, that the reversionary interest in Fritz von Opel is not an enemy interest, Respondent again disregards the findings of the District Court from which it did not appeal. The District Court found that there was no evidence of actual control by the enemy after 1940 or during the course of the war (F. 40, R. 58),[3] that Fritz von Opel's interest in the welfare of Germany existed only up to the outbreak of war, and that his citizenship in Liechtenstein was valid.

It is true that the District Court, taking all of the circumstances together, concluded that an enemy taint existed solely because the usufruct existed, but this conclusion presents the precise question held to be important by this Court and reserved in its opinion for future decision in the former consideration of this case.

Certain side issues are introduced by Respondent in its statement of facts which are in conflict with the findings of the Court and which, therefore, Respondent cannot raise

[3] Finding 41 (R. 59) is based on a mere inference of control after the war based on the existence of the usufruct and a presumption that in absence of evidence former control continued. When it was pointed out that Frankenberg, the alleged agent for enemy control, was in America and had applied for citizenship, the court explained the extent of the inference as follows (R. 1779, 1782-83):

> "I do not care whether he was an agent after the war or not. My point is the usufructuary interest had been set up * * *."
>
> "There are two forms of control that I am talking about. There are two forms. One of them exists by virtue of this usufructuary interest. That is number one. Now, that did not end, in my judgment.
>
> "I might grant that you are right on this other kind of control, * * * namely, that Frankenberg was over here bossing and telling them what to do. * * * I mean to say where an agency of another one over here, an American with an agency in Germany, would end at the outbreak of war, * * *.
>
> "You may be right, but I am inclined to think that, so far as bossing the company is concerned, I am not entitled to presume that after the outbreak of the war; * * *."

here. For example, Respondent argues in effect that the transaction creating the usufruct was a sham since it cites evidence introduced to establish this point including an alleged inconsistent position taken by the attorneys for Uebersee in the previous suit for the return of gold.[4] This evidence was all before the trial court. After considering it the District Court explicitly found (F. 18, R. 54-55) that the transaction was intended to be a gift "and was not intended to be a sham transaction, * * *". Since Respondent did not appeal from that finding it cannot collaterally attack it.

Conclusion.

The question of "the extent of holdings necessary to constitute enemy taint" was reserved for decision in the first opinion in this case because of its importance. The Government has conceded its importance in its brief in No. 172, now pending before the Court. It is also apparent that orderly administration of the Trading With the Enemy Act can be had only after the clarification of the problem through the exercise of this Court's power of review.

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[4] The legal memorandum in support of an application for a Treasury export license, discussing usufruct under Roman law, cited Justinian's reference to *nudum proprietatem* or "naked title" or "bare ownership" (R. 2082). The same language was included in Fritz von Opel's affidavit. (R. 2000) However, the affidavit of the German law expert who prepared the gift agreement actually sets forth the rights of the legal owner and the usufructuary in a usufruct (neissbraueh) under the provisions of the German Civil Code and does not use the inaccurate catch phrase "bare ownership" (R. 1986-90). The trial court placed no reliance on this alleged former inconsistent position in making its findings on the nature of usufruct under the German law upon the testimony of the German law experts (R. 60-61). The trial court rejected the respondent's contention of inconsistency when it decided the sham issue against the respondent.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted.

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